IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 09-0487

VALERIE EMMERSON,

Petitioner and Appellant,

v.

WALLACE C. WALKER and RANA RAE WALKER,

Respondents and Appellees.

WALLACE C. WALKER and RANA RAE WALKER,

Third-Party Plaintiffs and Appellees,

vs.

S. TUCKER JOHNSON,

Third-Party Defendant and Appellant.

On Appeal from Montana Sixth Judicial District Court, Sweet Grass County
Cause No. DV 2007-8, Hon. Wm. Nels Swandal

APPELLANT JOHNSON'S REPLY AND ANSWER BRIEF

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INTRODUCTION

Appellee's Opening Brief ("*Walkers' Brief*") is replete with improper personal attacks on Johnson, including numerous references to his wealth. Such debasing arguments degrade the dignity of the individual as well as the Court, and are improper. *See Estate of Miles v. Miles*, 2000 MT 41, ¶ 61, 298 Mont. 312, 994 P.2d 1139 (attorneys must "refrain from making . . . derogatory comments or personal attacks upon" other parties).

They are not responded to in this brief except where possibly relevant to the issues.

ARGUMENT

I. WALKERS ARE INCORRECT THAT JOHNSON'S ISSUES WERE NOT RAISED BELOW.

Walkers assert that Johnson never argued below that the legal act of assisting Emmerson, in exercising her constitutionally-protected right to seek redress through the courts, may not form the basis of a claim for tortious interference. [*Walkers' Brief*, at 16.] This is incorrect.

Johnson's central contention in the district court was that it is entirely proper for him to suggest that Emmerson obtain legal advice, and for him to provide Emmerson with funds for her legal fees. [Tr., at 230-231.] [*Third Party Defendant's*

Proposed Findings of Fact and Conclusions of Law, Case Register Report ("CRR") 96,[1] at 8.] Johnson contended that he "had the right to undertake his actions and was justified in his actions." [*Id.*, at 9.]

Thus, Johnson did argue below that helping Emmerson seek redress through the courts could not form the basis for liability based on tortious interference with contract. Accordingly, this issue is legitimately raised on appeal.

II. BECAUSE A FUNDAMENTAL RIGHT IS AT ISSUE, THIS COURT SHOULD DECIDE WHETHER THE DISTRICT COURT ERRED.

In any event, Johnson's claims are constitutionally-based and affect his substantial rights. Where substantial rights of the parties are involved, this Court rejects hypertechnical arguments about what was or was not raised below.

In *Halldorson v. Halldorson*, 175 Mont. 170, 573 P.2d 169 (1977). This court explained:

> In adopting the "plain error" doctrine we believe that appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court, and when that has occurred we can, within our sound discretion, consider whether the trial court has deprived a litigant of a fair and impartial trial, even though no objection was made to the conduct during trial.

Halldorson, 175 Mont. at 174, 537 P.2d at 172 (emphasis added); *see also* Mont. R.

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[1]A copy of the CRR is attached to *Appellant's Opening Brief ("Johnson's Brief,")* as Appendix 1.

Evid. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."); *McAlpine v. Midland Elec. Co.,* 194 Mont. 154, 158, 634 P.2d 1166, 1168-69 (1981) (stating that the "Court has a duty to determine whether the parties before it have been denied substantial justice by the trial court") (emphasis added). This Court has explained that its "commitment to the general rule does not negate [its] overriding obligation to acknowledge and protect the substantial rights of litigants." *State v. Carter,* 2005 MT 87, ¶ 13, 326 Mont. 427, 114 P.3d 1001 (emphasis added).

Moreover, this Court "reserves . . . the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law." *In the Matter of N.B.,* 190 Mont. 319, 323, 620 P.2d 1228, 1231 (1980). This Court will consider the issue "for the first time on appeal if the alleged District Court error affects the substantial rights of a litigant." *Id.*, at190 Mont. at 323, 620 P.2d at 1231.

Here, Johnson's substantial rights are affected. *See Cottrill v. Cottrill Sodding Service,* 229 Mont. 40, 41-45, 744 P.2d 895, 896-897 (1987) (exercising plain error review because freedom of speech is a fundamental right). *See also Eastman v. Atlantic Richfield Co.,* 237 Mont. 332, 337, 777 P.2d 862, 865 (1989) (court has "power to examine constitutional issues that involve broad public concerns" because the alleged error affected the plaintiff's substantial rights).

III. WALKERS' CENTRAL ARGUMENT THAT JOHNSON INDUCED A BREACH OF CONTRACT IS WRONG–THE CONTRACT WAS NOT BREACHED, IT WAS ENFORCED.

Refreshingly, Walkers concede that "Emmerson had an absolute right to petition the court to seek redress of her grievances arising out of the exchange agreement. No one argues otherwise." [*Walkers' Brief*, at 25.] Given Emmerson's "absolute right," how can it be tortious conduct for Johnson to urge her to exercise that right? Walkers' primary response is that Johnson did more than simply induce Emmerson to file a lawsuit. They argue that he induced a breach.

But Emmerson never breached the Walker Agreement. Instead, she asked the court to determine whether the Agreement was enforceable. [*See* CRR 1.] And the court below never found that Emmerson breached. Instead, it enforced the Agreement.

A. The District Court Did Not Find a Breach. Emmerson Has Specifically Performed by Conveying the Land to Walkers.

The district court did not find that Emmerson breached the contract–just the opposite. The court found that the Agreement between Walkers and Emmerson was a valid, enforceable contract and it determined that:

> Walkers are entitled to have Emmerson specifically perform by transferring her property to Walkers in exchange for the transfer of Walker property to Emmerson.

[Conclusion of Law No. 9.] Emmerson has now transferred her property to Walkers and this aspect of the district court's Judgment has not been appealed.

B. The Repudiation Argument Is a Red Herring.

Citing *dicta*, Walkers argue that the contract was "repudiated" and therefore breached (citing various Montana cases on anticipatory repudiation). [*Walkers' Brief*, at 22-24.] This is a red herring. Emmerson's attempt to repudiate the contract was immediately followed by her declaratory judgment action regarding enforceability of the contract, which she lost. She then performed. Thus, the attempted repudiation was promptly nullified.[2]

For their part, Walkers did not declare an anticipatory breach–rather, they treated the Emmerson letter as an empty threat and they proceeded to enforce the contract. *See Taylor v. Johnston*, 539 P.2d 425, 430, Sup. Ct. of Cal., *In Bank.* (1975) (holding that the injured party has an election of remedies: he can treat the repudiation as an anticipatory breach and immediately seek damages "or he can treat the repudiation as an empty threat").

The *Taylor* court continued:

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[2]Section 256 of the Restatement (Second) Contracts, provides that a repudiating party may "nullify" a repudiation if retracted before the other party "materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final." *Id.* § 256(1).

> [I]f the injured party disregards the repudiation and treats the contract as still in force, and the repudiation is retracted prior to the time of performance, then the repudiation is nullified and the injured party is left with his remedies, if any, invocable at the time of performance.

Id., at p. 430-431 (emphasis added). That's exactly what Walkers did. They disregarded Emmerson's letter and treated the contract "as still in force."

Walkers can't have it both ways. They can't take advantage of Emmerson's performance while, at the same time asserting breach.

C. Walkers' Belated Argument That Delay in Performance Constituted Breach Is Incorrect.

Walkers further argue that there was somehow a breach because performance was delayed by the filing of the declaratory judgment action. But they did not raise this argument below. Walkers' Answer, and the later Counterclaim, never alleged breach. [CRR 6, 29.] Instead they opted to enforce specific performance. Because breach and delay simply were not issues it is understandable why the district court did not reach a conclusion regarding them. In any event, Walkers themselves delayed in clearing the state land's easement contingency.[3]

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[3]The Agreement was executed on May 15, 2006. It was not until some time after November 27, 2006–one month after Emmerson told the Walkers she had a better offer–that the Walkers even began to work on the easement issue. [*See* Order, CRR 99, at 10, 12.] It was not until February 14, 2007 that the Walkers informed Emmerson that they planned to tender performance the following week, on February 20, 2007. [*See* Order, CRR 99, at 17.] The Walkers asked Emmerson to confirm that she would perform her obligations within 60 days of February 20, *i.e.,* by April 21,

As Johnson explained in his Opening Brief, Emmerson had not only a constitutional right to seek redress through the courts, she also had a statutory privilege to do so. Section 27-8-203, MCA, provides: "A contract may be construed either before or after there has been a breach thereof." (Emphasis added.) *See Cincinnati Ins. Co. v. Franck,* 621 N.W.2d 270, 273-74 (Minn. Ct. App. 2001) ("Declaratory judgments permit determination of a controversy "before obligations are repudiated or rights are violated, . . . ").

In order to resolve such disputes promptly, Montana law provides: "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." Mont. R. Civ. P. 57.

Obviously a party who, pursuant to statutory law, petitions the court for a declaration of her rights before a breach occurs, cannot be held liable for a supposed breach that occurs because of the delay a declaratory judgment necessarily entails. *See Lincoln Property Co. v. Travelers Indemnity Co.*, 137 Cal.App.4th 905 (2006) ("[A] decree for specific performance bars a subsequent action for monetary relief based on the same breach of contract, even if this subsequent action seeks to recover for delay in performance occasioned by the litigation."). *Id.*, at 913. Emmerson's filing of the declaratory judgment action well before performance was due was simply

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2007. [*See* Order, CRR 99, at 17.]

not a breach.

D. Inducing Court Action Is Not "Improper" under § 767 of the Restatement.

In certain circumstances, even if there is no induced breach, liability may arise if performance is made more expensive or burdensome. *See Bolz v. Myers*, 200 Mont. 286, 292-293, 651 P.2d 606, 609 (1982), citing Restatement (Second) of Torts, § 766A. But *Bolz* makes it clear, relying on Restatement (Second) of Torts, § 767, that such inducement must be both intentional and improper, and cites the seven factors of the Restatement, § 767, including subsection (e), that the Court must look at the "social interests in protecting the freedom of action of the actor[.]"

Given that there clearly was no breach here, the only basis for Walkers prevailing is to show, under the more lenient standard of Restatement, § 766A, that performance was more burdensome or expensive. Performance was not more expensive because Walkers were made whole by the award of contract attorneys fees. In any event:

> The fact that economic injury has taken place "[can]not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."

Clairborne, *infra*, 458 U. S. at 914.

Regarding burden, any declaratory judgment action results in some burden, but

it is not an improper burden for purposes of a tortious interference claim. In *St. Paul Fire & Marine Ins. Co. v. Cuminskey*, 204 Mont. 350, 665 P.2d 223 (1983), the court rejected a bad faith claim, finding: "The action for declaratory judgment was appropriately brought to determine the legal rights and relationships of the parties." *Id.*, at 359-360.

Regarding § 767(e) of the Restatement the court in *State of S. D. v. Kanasa City Southern Industries, Inc.* 800 F.2d 40, 50 (8th Cir.1989), stated:

> In the spirit contained in Restatement (Second) of Torts, § 767(e), there are certain privileged activities which may result in interference of contractual relationships but which shall not incur liability. One such activity involves the first amendment right to petition the government for redress of grievances.

In *State of Mo. v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980), the court rejected a claim of tortious intentional infliction of emotional harm because the defendant's boycott activities were privileged on the basis of the First Amendment's right to petition. As this Court did in *Bolz*, the *Missouri* court specifically applied Restatement (Second) of Torts, § 767 (1977), and noted that among the factors to be considered are the "social interests in protecting the freedom of action of the actor and the contractual interests of the other[.]" *Id.*, at 1316. In assessing social interests and protecting the freedom of action of the actor, it specifically relied on *Sierra Club v. Butz*, 349 F.Supp. 934, 939 (N.D. Cal. 1972). In

Sierra Club, counterclaims were filed based on interference with advantageous relationship. The court dismissed them holding that:

> Liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petitioning is a "sham," and the real purpose is not to obtain governmental action, but otherwise injure the plaintiff.

In *Nesler v. Fisher & Co.*, 452 N.W.2d 191 (Iowa 1990), the Iowa Supreme Court also applied § 767, Restatement (Second) of Torts in holding that the filing of a lawsuit can be the basis for tortious interference only if there is an "absence of a good-faith belief in the merits of the litigation." *Id.*, at 198.

Here, Emmerson's suit was not a sham, it was designed to invalidate the contract. Although she did not succeed, her goal, as well as Johnson's, were clear. They proceeded in good faith on advice of counsel and genuinely hoped to get relief through the courts. Thus, Johnson's actions were not improper within the meaning of § 767(e).

This is the analysis that should have been undertaken by the district court and, once undertaken, would have lead to a rejection of Walkers' claims. The right to petition through the courts is fundamental and may not be infringed absent a much stronger showing than the one involved here. In *Scott v. Hern*, 216 F.3d 897, 914 (10th Cir. 2000), the court stated:

> Numerous other courts have likewise held that the Petition Clause places limits on liability for the commission of a range of common law torts. *See Cheminor Drugs, Ltd. v. Ethyl, Corp.*, 168 F.3d 119, 128 (3d Cir.) (malicious prosecution, tortious interference with contract, tortious interference with prospective economic advantage, and unfair competition), *cert. denied*, 528 U.S. 871, 120 S.Ct. 173, 145 L.Ed.2d 146 (1999); *State of South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40, 50 & n. 24, 53-55 (8th Cir. 1989) (tortious interference with contract); *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications*, 858 F.2d 1075, 1084 (5th Cir. 1988) (tortious interference with contractual relations); *Havoco of Am., Ltd. v. Hallobow*, 702 F.2d 643, 649-40 (7th Cir. 1983) (tortious interference with business relationships); *Suburban Restoration Co. v. ACMAT Corp.*, 700 F.2d 98, 101-02 (2d Cir. 1983) (tortious interference with a business expectancy); *Computer Assoc. Int'l, Inc. v. American Fundware, Inc.*, 831 F.Supp. 1516, 1523 (D.Colo. 1993) (unfair competition); *Pennwalt Corp. v. Zenith Lab., Inc.*, 472 F.Supp. 413, 424 (E.D.Mich. 1979) (tortious interference with business relationships and abuse of process), *appeal dismissed*, 615 F.2d 1362 (6th Cir. 1980); *Sierra Club v. Butz*, 349 F.Supp. 934, 937-39 (N.D.Cal. 1972) (tortious interference with advantageous relationship); *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1133-38, 270 Cal.Rptr. 1, 9-12 791 P.2d 587, 595-98 (Cal. 1990) (intentional interference with contract and intentional interference with prospective economic advantage).

Id. (emphasis added).

IV. THE LITIGATION PRIVILEGE EXTENDS TO JOHNSON AS WELL AS EMMERSON.

Walkers concede that there are circumstances in which a third party such as Johnson is "privileged to promote a contracting party's litigation[.]" They again argue, however, that the privilege does not extend to Johnson because Johnson "induc[ed] Emmerson's repudiation and breach of the exchange agreement."

[*Walkers' Brief,* at 24.] There was no breach. *See* section III.

They also try to avoid application of the litigation privilege to Johnson through several side excursions. First, they talk about the "sanctity of contract[,]" arguing if contracts were to be easily set aside, one of the very bases of our law would be gone. [*Walkers' Brief,* at 29.] Johnson repeats: the Walker Agreement was not "set aside." It was not breached. It was enforced. The "sanctity" of contracts remains intact.

They also argue that Johnson, a stranger to the contract, lacks standing. [*Id.*, at 25.] That contradicts what they just said–that there are some circumstances where a third party is "privileged to promote a contracting party's litigation[.]" Moreover, the argument misses the point. Johnson never claimed that he was a party to the contract or that he could personally enforce it. Instead, his defense is simply that his inducement is constitutionally-protected. That has nothing to do with whether Johnson personally had standing to enforce the contract.

These oblique arguments do not come to grips with the authorities which hold that a person may not be held liable for tortious conduct merely for inducing a party to pursue legal redress regarding enforceability of a contract. *See Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F. Supp. 220, 222 (D. Kan. 1996) and *Nesler, supra.* Both cases are directly on point because they involve tort damage claims against third parties who are charged with tortious interference because they induced

litigation.[4] Both held that the inducement to litigate was protected activity which could be made the subject of damage actions only with heightened showing of malice (*Eddy's*), or an absence of a good faith belief in the merits (*Nesler*).

Walkers also try to distinguish *Eddy's* and *Nesler* by arguing that "[u]nlike Johnson, Kmart did not induce a breach of contract[.]" *Id.* Johnson did not induce a breach. So this case is exactly like *Eddy's*. *Nesler* is even less helpful because there a breach was induced, but the litigation activities were held, nevertheless, to be protected. 452 N.W.2d 191, 199-200.[5]

Significantly, Walkers concede that *Eddy's* and *Nesler* may have been correct decisions, stating:

> As with *Eddy's*, Johnson relied on law he cites from *Nesler* to further his argument that he can't be held liable in tort for Emmerson's litigation unless the lawsuit was filed maliciously or without a good-faith belief in its merits. Again, this may be the correct outcome, if promoting litigation was all Johnson did.

Id. at 28 (emphasis added). Walkers then emphasize various other acts of Johnson

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[4]In *Eddy's*, Kmart induced its landlord to sue another lessee, to prohibit it from subleasing to an adult bookstore. In *Nesler*, a landlord persuaded its handicapped tenants to sue a competing landlord on handicap issues in order to dissuade potential tenants from defecting.

[5]The *Nesler* court gave directions on instructions for a new trial, stating that such guidance was necessary because without it, "the jury would be free to find interference based solely on the filing of the lawsuits and the building complaints without regard to the motivations behind them." *Nesler*, 452 N.W.2d at 198.

that set it apart from *Eddy's* and *Nesler*.

This distinction fails, however, because in both *Eddy's* and *Nesler* there were also other acts introduced in an attempt to establish tortious interference. For example, in *Eddy's* there was evidence that Kmart induced customers and employees to send protest letters to Eddy's owner. 945 F.Supp. at 220. The court held that these letters were "protected free speech and cannot form a basis for plaintiff's tortious interference claim. Expressions of opinions and peaceful means of protest are protected from actions alleging interference with business." *Id.*, at 224.

Likewise, in *Nesler* the defendant's inducement of handicapped persons to file suit was not "all [he] did." There was evidence of many objectionable acts of the defendant, including suing the county board when it didn't accept defendant's low rent bid, a strategy of "repeated trips" to the plaintiff's building and the city building department for purposes of "pressuring the building inspector to take action against the project[,]" encouraging the news media to report inspections on alleged building violations, and efforts to undermine the confidence of the financing banks. 452 N.W.2d, at 193. Because of this mixed evidence, the court held it particularly important that the jury be properly instructed so that legitimate protected First Amendment activity not be improperly penalized.

As in *Eddy's* and *Nesler,* even if Johnson encouraged Emmerson to file suit,

these acts are fully protected unless the lawsuit was filed maliciously or without a good-faith belief in its merits. No such allegation was made in this case, and the court did not so find. In fact, the court explicitly stated that Johnson had not acted with malice. Johnson's acts of advising Emmerson to seek legal counsel and paying her legal fees are protected because, in doing so, Johnson was taking steps within the civil legal system to find out if the Walker Agreement was actually valid.

Because Johnson did not induce Emmerson to breach the Walker Agreement, and because Johnson did not act with malice, his conduct was privileged and cannot form the basis for tort liability. The case must be reversed and remanded.

V. THE TORTIOUS INTERFERENCE CLAIM MAY NOT BE BOOTSTRAPPED ONTO OTHER ACTS OF JOHNSON WHICH WERE NOT ILLEGAL OR TORTIOUS.

A. The Other Acts of Johnson Were Not Illegal or Tortious.

Walkers accuse Johnson of "whitewashing" the facts. They argue that Johnson did much more than simply induce Emmerson to file a declaratory judgment action. They cite a litany of events each of which, if taken separately, does not amount to wrongful or tortious conduct. Added together, however, they try to paint a picture of Johnson as a wealthy, aggressive and unsavory person who deserves to be punished, even though the exact basis for the punishment remains unclear.

There is a danger in this tactic because tort damages may be imposed for a mix

of acts some of which are constitutionally protected. For example, if the evidence shows that Johnson committed acts 1, 2, 3, 4, and 5, and act 4 is protected by the First Amendment, but acts 1, 2, 3, and 5 are not, a court may not find Johnson guilty of tortious interference by loosely referring to all five acts. This is essentially what the court did here.

In finding that Johnson tortiously interfered with the contract, the court describes six acts. [Order, CRR 99, at 24-25.] The first two simply amount to backup offers by Johnson (first an offer to Emmerson that was better than Walkers' and, second, Johnson's act in entering into an exchange agreement with Emmerson). Neither backup offer came to fruition. Instead the court ordered specific performance and Emmerson conveyed the property to Walkers. There is nothing improper about these backup offers. They are common. *See Johnson's Brief*, at 37-39.

The remaining four acts cited by the court (providing a lawyer, legal opinions, and funding the lawsuit) all center on Johnson's assistance of Emmerson's efforts to seek legal redress. [*See* Order, CRR 99, at 24-25.] These acts implicate protected court redress activity of both Emmerson and Johnson.

Guidance can be found from the law of civil conspiracy, which involves similar concerns. *Simmons Oil Corp. v. Holly Corp.* (1993), 258 Mont. 79, 91, 852 P.2d 523, 530, made absolutely clear that, without an unlawful act, a conspiracy claim fails:

> If Holly committed no wrong, then there can be no conspiracy . . . because no conspiracy claim can exist if there is not an underlying unlawful act.

As in *Simmons*, Walkers should not be allowed to bootstrap a claim of tortious interference with contract onto a set of other acts which plainly are not unlawful.

B. Precision in Review Is Required Lest Constitutionally-Protected Acts Be Punished.

As noted, the First Amendment does not allow imposition of tort damages based on acts that are constitutionally protected. A mixed series of acts, such as those involved here, must be precisely examined, to make sure damages liability is not unconstitutionally imposed.

Walkers' coarse attempts to impugn Johnson's character make it all the more important that this Court pierce through the smoke and carefully scrutinize the precise basis for imposition of tort liability and damages. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the court reversed a substantial award which was based on a civil rights boycott which white merchants claimed interfered with their businesses.

The *Claiborne* Court was faced with a tort damage award (conspiracy and tortious interference) based on a series of mixed acts, some of which were protected by the First Amendment (peaceful boycotting)[6] and some of which were not (violence

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[6]The Court found that act of organizing and boycotting were core protected activities citing *State of Mo. v. National Organization for Women, Inc.*, 622 F.2d

and threat of violence). Addressing this issue, the Court stated:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. *NAACP v. Button*, 371 U. S. 415 . . . Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability . . .

Id. at 916-917 (emphasis added).

For that reason, regardless of the smoke, the analysis must return to the core issue: was Johnson punished for inducing Emmerson to file a declaratory judgment action?

The *Claiborne* court relied on *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), stating that the *Gibbs* "Court found that the pleadings, arguments of counsel, and jury instructions had not adequately defined the compass within which damages could be awarded under state law." *Id.*, at 917-918. Citing *Gibbs*, the Court held that a state court award of tort damages must be "restricted to those directly and proximately caused by wrongful conduct chargeable to the defendants." *Id.*

As in *Gibbs*, in this case, the loose recitation of a series of acts by Johnson, which include protected activity, failed adequately to "define the compass within

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1301, 1317 (8th Cir. 1980), for the proposition that "[t]he right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott." *Claiborne*, at 914, fn 48.

which damages could be awarded."

VI. THE EMOTIONAL DISTRESS AWARD TO WALKERS, ON THE THINNEST OF EVIDENCE, IS A STRONG INDICATION OF THE CHILLING EFFECT ON THE FUNDAMENTAL RIGHT TO COURT ACCESS.

Walkers try to justify the court's substantial award of $150,000 for emotional distress by vilifying Johnson and his wealth, rather than their own concrete evidence of emotional distress. In doing so, they miss Johnson's point.

Johnson noted in his Opening Brief that *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, 215 P.3d 649 now makes it clear that distress damages may be awarded in cases for "parasitic" emotional distress claims. There is no "serious or severe" threshold standard for such award. *See Johnson's Brief*, at 19-20.

Given this relaxed standard, the award of $150,000 on the thinnest of evidence (self-serving subjective testimony not backed up by any professional psychologist or M. D.) is a prime example of the chilling effect such an award can have on the exercise of fundamental rights. This is all the more reason why the underlying liability decision of the court must be carefully scrutinized.

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PUNITIVE DAMAGES.

The Walkers argue that the court "misapprehended the law" with respect to malice. This is not true. There is substantial evidence that Johnson did not want to

cause a dispute and that he understood, in making his backup offer, that it was just that–a backup offer. [Order, CRR 99, at 12]. [Tr., at 251, 269.]

This issue was an easy one for the Judge, who ruled immediately from the bench. [Tr., at 310.] The court was obviously well-familiar with the definition of actual malice in § 27-1-221(2), MCA, which requires evidence that the defendant deliberately acted in conscious disregard of or with willful indifference to a high probability of injury to the plaintiff. The court's Finding of Fact No. 15, relied on by Walkers, recites a garden variety set of acts which does not come close to showing the malice required by the Montana punitive statute. [*Walkers' Brief*, at 44.] The elements of a claim for punitive damages "must be proved by clear and convincing evidence." MCA § 27-1-221(5) (emphasis added); *see also Dees v. Am. Nat'l Fire Ins. Co.*, 260 Mont. 431, 445, 861 P.2d 141, 149 (1993).

"A district court judge, having heard the evidence and observed the witnesses, is in the best position to determine whether the requirements of proof of punitive damages have been met." *Dees,* 260 Mont. at 446, 861 P.2d at 150. A district court's finding that punitive damages are not warranted will not be overruled "absent an abuse of discretion." *Dees,* 260 Mont. at 446-47, 861 P.2d at 150.

Here, the district court did not find that Johnson knew or disregarded any facts "that create[d] a high probability of injury" to the Walkers.

The only "injury" that Johnson knew he might cause was that he might purchase property that the Walkers wanted. There was no reason for Johnson to infer that Walkers could not have purchased other property, or that the Walkers had a dream to run a family ranch. And, in fact, the district court found that "Johnson told Josephson that he did not want to cause a dispute." [Order, CRR 99, at 12.] This is not the stuff of actual malice.

In sum, the district court did not abuse its discretion in refusing to award punitive damages.

CONCLUSION

The award of compensatory damages against Johnson was in error and should be reversed. The denial of punitive damages against Johnson should be affirmed. The case should be remanded with directions to dismiss.

DATED this 30th day of March, 2010.

GOETZ, GALLIK & BALDWIN, P. C.

By: _____
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ATTORNEYS FOR APPELLANT S. TUCKER JOHNSON

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft WordPerfect X4 does not exceed 5,000 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

DATED this 30th day of March, 2010.

GOETZ, GALLIK & BALDWIN, P.C.

By: _____

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I certify under penalty of perjury that the foregoing document was served upon the following counsel via first class mail on the 30th day of March, 2010.

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